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No. 79-1242

IN THE

Supreme Court of the United States

October Term, 1979

TIFFANY CONSTRUCTION CO., INC.,
Petitioner,

v.

BUREAU OF REVENUE, STATE OF NEW MEXICO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 3

ARGUMENT 5

I. This Court Should Decline To Decide The Question Of Whether New Mexico's Taxation Of Petitioner's Gross Receipts From A Construction Project Performed On The Navajo Reservation Interferes With The Right Of The Navajos To Make Their Own Laws And Be Governed By Them 5

A. This Court lacks jurisdiction under 28 U.S.C.A. §1257(3) to review the above question, hereinafter referred to as the Indian sovereignty question, because the question was not properly raised in the New Mexico courts . . . 6

B. Even should this Court take jurisdiction to decide the Indian sovereignty question, the imposition of New Mexico's gross receipts tax on a non-Indian contractor does not violate Indian sovereignty 8

II. The New Mexico Court of Appeals Correctly Denied Petitioner's Claim That The Imposition Of New Mexico's Gross Receipts Tax Upon It Under The Circumstances Of This Case Constitutes A Denial Of Due Process Guaranteed By The Fourteenth Amendment Of The United States Constitution . . . 9

A. This Court should decline to review the factual determinations of the New Mexico courts regarding Petitioner's due process claims . 10

B. Even should this Court review Petitioner's due process claims, the imposition of New Mexico's gross receipts tax does not deny the Petitioner due process under the facts of this case 10

CONCLUSION 14

CASE CITATIONS

Page

Adler v. Board of Education,
342 U.S. 485 (1952) 7

Agricultural Bank v. Tax Commission,
392 U.S. 339 (1968) 9

Agua Caliente Band of Mission Indians v. County of Riverside,
442 F.2d 1184 (9th Cir. 1971). 9

Association of Data Processing Service Organizations, Inc. v. Camp,
397 U.S. 150 (1970) 9

Barrows v. Jackson,
346 U.S. 249 (1953) 9

Beaty v. Richardson,
276 U.S. 599 (1927) 7

Beck v. Washington,
369 U.S. 541 (1962) 7

Bonner v. Gorman,
213 U.S. 86 (1909) 7

Cardinale v. Louisiana,
394 U.S. 437 (1969) 7

Carmichael v. Southern Coal & Coke Co.,
301 U.S. 495 (1937) 13

Complete Auto Transit, Inc. v. Brady,
430 U.S. 274 (1977) 10

Dewey v. Des Moines,
173 U.S. 193 (1899) 7

Diamond National v. State Equalization Board,
425 U.S. 268 (1976) 8

Fort Mojave Tribe v. County of San Bernardino,
543 F.2d 1253 (9th Cir. 1976). 9

Fry Roofing Co. v. Wood,
344 U.S. 156, 160 (1952) 10

Grayson v. Harris,
267 U.S. 352, 358 (1925) 10

CASE CITATIONS (cont.)

Page

Gurley v. Rhoden,
421 U.S. 200 (1975) 8

Hanson v. Denckla,
357 U.S. 235 (1958) 9

Herndon v. Georgia,
295 U.S. 441 (1935) 7

Mescalero Apache Tribe v. O'Cheskey,
439 F.Supp. 1063 (D.N.M. 1977), *appeal pending* (10th Cir. No. 77-2102) 8

Missouri Pacific Railroad v. Road District,
266 U.S. 187 (1924) 13

Moe v. Confederated Salish and Kootenai Tribes,
425 U.S. 463 (1976) 9

National Geographic Society v. California Board of Equalization,
430 U.S. 551, 557 (1977) 11

Portland R., L. & P. Co. v. Railroad Commissioner,
229 U.S. 397, 412 (1913) 10

Safeway Stores v. Oklahoma Grocers,
360 U.S. 334 (1959) 7

State Farm Mutual Insurance Co. v. Duel,
324 U.S. 154 (1945) 7

State of Wisconsin v. J. C. Penney Co.,
311 U.S. 435 (1940) 12

Tileston v. Ullman,
318 U.S. 44 (1943) 9

United States v. County of Fresno,
429 U.S. 452 (1977) 8

United States v. State of New Mexico,
581 F.2d 803 (10th Cir. 1978). 8

Waters-Pierce Oil Co. v. Texas,
212 U.S. 112 (1909). 7

Wilson v. Cook,
327 U.S. 474 (1946) 7

UNITED STATES CONSTITUTION:

Page

Amendment XIV, §1 3

TREATY:

Treaty of 1868 Between the United States of America and the Navajo Tribe of Indians 3

STATUTES AND RULES:

28 U.S.C.A. §1257(3) 6, 7
U.S. Sup. Ct. Rule 23(f), U.S.C.A. 7
§7-9-3(E) NMSA 1978. 8
§7-9-3(K) NMSA 1978 8
§7-9-4 NMSA 1978 8

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OPINIONS BELOW

The decision of the district court for Santa Fe County is unreported and appears at Appendix C of the Petition. The opinion of the Court of Appeals of the State of New Mexico is reported at the State Bar of New Mexico Bulletin and Advance Opinions, Volume 18, No. 50, December 13, 1979, and appears at Appendix A of the Petition. The New Mexico Supreme Court denied in an unreported order the Petitioner's Petition for a writ of certiorari, which appears at Appendix B of the Petition.

JURISDICTION

This Court is without jurisdiction to review the questions posed by Petitioner. Questions (i) and (ii) assume facts not found by the courts below, and thus Petitioner is seeking to have this Court review the decisions of the New Mexico courts on questions of fact. Question (iii) seeks review by this Court of a question which was not adequately presented or argued and was not decided by the New Mexico courts below.

QUESTIONS PRESENTED

The questions presented by Petitioner are improper. Questions (i) and (ii) misstate the record and findings of the District Court below, which findings were affirmed by the New Mexico Court of Appeals.

Question (i) poses the question of the legality of the imposition of New Mexico's tax on Petitioner's construction activities on the Navajo Reservation within the State of New Mexico when Petitioner's employees "never enter non-Indian land in the State of New Mexico." (Petition, p. 2) The record does not support this statement, nor did the New Mexico courts make factual findings to support the statement.

Question (ii) frames the question of the legality of the imposition of New Mexico's tax on Petitioner where Petitioner "receives no benefits from the State of New Mexico." (Petition, p. 2) The trial court found that Petitioner received substantial benefits from the State of New Mexico. (finding of fact, No. 23, Petition, App. C., p. 23) This finding was reviewed and upheld on appeal. (Petition, App. A, pp. 15, 16)

Questions (i) and (ii) implicitly seek this Court's review of the substantiality of the evidence underlying the decisions

below. The respondent urges this Court to decline review of these questions.

Question (iii) raises the sovereignty of the Navajo Tribe as a basis for striking down New Mexico's tax. This Court lacks jurisdiction to decide this question because it was never litigated or decided by the courts below. Additionally, Petitioner lacks standing to raise this issue.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The pertinent constitutional provision (United States Constitution, Amendment XIV, §1) and the treaty involved (Treaty of 1868 between the United States of America and the Navajo Tribe of Indians) are set forth in the Petition at page 3 and Appendix D (pp. 26-35) respectively.

STATEMENT OF THE CASE

Petitioner, Tiffany Construction Company, Inc., ("Tiffany") is an Arizona corporation with its principal office in Phoenix, Arizona. Tiffany is a registered taxpayer with the New Mexico Taxation and Revenue Department (Tr. Proc. 34), the successor agency to the Respondent New Mexico Bureau of Revenue.

On October 4, 1974, Petitioner entered into a contract with the United States of America, Department of Interior, Bureau of Indian Affairs, to grade and drain 20.719 miles of roadway on the Navajo Reservation. The section of road involved is located entirely within the borders of the State of New Mexico. Under its contract Petitioner was required to furnish all labor, materials and equipment necessary to perform the contract. During the performance of the contract, Petitioner had approximately 100 employees working in New Mexico (Tr.

Proc. 54) Petitioner also had at least 20 large pieces of construction equipment on the job site in New Mexico. (Tr. Proc. 55) Petitioner maintained this presence in New Mexico for approximately one year, during the course of the performance of the contract. (Tr. Proc. 54) Petitioner's employees and equipment were transported into New Mexico to the construction site via New Mexico Highway 504 and U.S. Highway 666. (Tr. Proc. 56) Both New Mexico Highway 504 and U.S. Highway 666 are maintained by the State of New Mexico. (Tr. Proc. 145, 147)

Petitioner paid the State of New Mexico, Bureau of Revenue, $78,583.03 in gross receipts taxes and interest, based upon its receipts from the construction project performed in New Mexico. Petitioner sought a refund of these taxes in the New Mexico courts. The New Mexico Court of Appeals found that Petitioner had received at least three benefits from New Mexico: The use of roads maintained by New Mexico; the protection of New Mexico's regulation of air pollution from the Four Corners Power Plant; and receipt of the privilege of engaging in business in New Mexico. (Petition, App. A, pp. 15, 16) Thus the court found that Tiffany received sufficient benefits to uphold the taxes imposed.

In its Statement of the Case, Tiffany cites many irrelevant facts and misstates others. Tiffany claims that it is not licensed or authorized to do business in New Mexico. However, it is a registered taxpayer. (Tr. Proc. 34) The fact that Tiffany disregarded other New Mexico statutory requirements for licensing is irrelevant and should not be regarded as a point to Tiffany's credit to show lack of contact or benefit from the State of New Mexico.

Petitioner attempts to enhance the Indian aspect of this case by stating that the Navajo Tribe was also a party to the road construction contract. (Petition, pp. 3, 4) This is contrary to

the affidavit and the testimony of their own comptroller, Ted Skowronek. (Affidavit of Skowronek, pgf. 11, Tr. Rec. 56, Tr. Proc. 36) This is also contrary to Petitioner's proposed finding of fact, No. 21. (Tr. Rec. 67)

Tiffany seeks to mislead this Court by its assertion that it received no benefits from the State of New Mexico. (Petition, p. 5) Benefits were shown below and incorporated in the decisions of both the trial court (finding of fact, No. 23, Petition, App. C, p. 23) and the New Mexico Court of Appeals. (Petition, App. A, pp. 16, 17) There was substantial evidence to support these holdings.

Tiffany states that its employees were either Arizona residents or Navajo Indians. (Petition, p. 4) While this statement is not challenged by the Respondent, the implication that Tiffany's employees had no relation to New Mexico is challenged. There is no evidence to show that Tiffany's Navajo employees were not also New Mexico citizens. Tiffany also overstates the evidence when it claims that its Arizona employees never left the Navajo Reservation. (Petition, p. 4) Tiffany's comptroller testified that: he did not know if every Tiffany employee spent every night in the camper trailers on the construction site; (Tr. Proc. 55); he did not know if employees left the job site at night (Tr. Proc. 57); and that Tiffany did not require employees to report what they did on their personal time. (Tr. Proc. 66)

ARGUMENT

I. THIS COURT SHOULD DECLINE TO DECIDE THE QUESTION OF WHETHER NEW MEXICO'S TAXATION OF PETITIONER'S GROSS RECEIPTS FROM A CONSTRUCTION PROJECT PERFORMED ON THE NAVAJO RESERVATION INTERFERES WITH THE RIGHT OF THE NAVAJOS TO MAKE THEIR OWN LAWS AND BE GOVERNED BY THEM.

A. This Court lacks jurisdiction under 28 U.S.C.A. §1257(3) to review the above question, hereinafter referred to as the Indian sovereignty question, because the question was not properly raised in the New Mexico courts.

The jurisdiction of this court is invoked under 28 U.S.C.A. §1257(3). (Petition, p. 2) This section, which defines this Court's certiorari jurisdiction, provides for review of final judgments or decrees rendered by the highest state court where:

> "Any title, right, privilege or immunity is *specially set up or claimed* under the constitution, treaties or statutes of, or commission held or authority exercised under the United States." (Emphasis added.)

The Indian sovereignty issue was not properly set up, claimed or decided by the highest New Mexico court in which the decision could be had. Although the record reveals that the Indian sovereignty issue was raised in Petitioner's complaint as Count III (Tr. Rec., 2), no evidence was presented at trial on this issue. Additionally, the trial court did not specifically decide this question. (Decision of the district court for Santa Fe County, Petition, Appendix C).

Even if this Court found that the issue was sufficiently raised in the district court, it was abandoned by Petitioner in its appeal to the New Mexico Court of Appeals. This is clear, even from the Petition, where Petitioner correctly set forth the issues on appeal to the New Mexico Court of Appeals. (Petition, pp. 5, 6) Nowhere is the Indian sovereignty issue listed. Since the sovereignty question was not at issue, the New Mexico Court of Appeals did not decide the issue in its opinion. (Petition, Appendix A)

In construing 28 U.S.C.A. §1257(3), Mr. Justice Harlan stated:

> "The rule that in cases coming from state courts this Court may review only those issues which were presented to the state court is not discretionary but jurisdictional. *Amalgamated Food Employees Union v. Logan Valley Plaza,* 391 U.S. 308, 334 (1968) (dissent)."

This position follows a long line of well established authority. *Cardinale v. Louisiana,* 394 U.S. 437 (1969); *Safeway Stores v. Oklahoma Grocers,* 360 U.S. 334 (1959); *Adler v. Board of Education,* 342 U.S. 485 (1952); *State Farm Mutual Insurance Co. v. Duel,* 324 U.S. 154 (1945); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 112 (1909); *Bonner v. Gorman,* 213 U.S. 86 (1909); *Dewey v. Des Moines,* 173 U.S. 193 (1899). It is also well established that the federal question must be pursued on appeal to the state courts, as well as being raised at the lower level, or else the question is deemed to have been waived. *Beck v. Washington,* 369 U.S. 541 (1962); *Wilson v. Cook,* 327 U.S. 474 (1946); *Herndon v. Georgia,* 295 U.S. 441 (1935); *Beaty v. Richardson,* 276 U.S. 599 (1927).

In addition to failing to meet the jurisdictional requirements of 28 U.S.C.A. §1257(3), Petitioner has also failed to meet the requirements of the Supreme Court Rules. Rule 23(f) provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also specify the stage and the proceedings in the court of first instance and in the appellate court at which, and in the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . .; and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific references to the places in the record where the matter appears . . . as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." U.S. Sup. Ct. Rule 23(f), U.S.C.A.

The petition does not show that the Indian sovereignty issue was raised in or decided by the New Mexico Court of Appeals. Petitioner was unable to comply with this rule simply because this issue was not raised before the New Mexico Court of Appeals.

B. Even should this Court take jurisdiction to decide the Indian sovereignty question, the imposition of New Mexico's gross receipts tax on a non-Indian contractor does not violate Indian sovereignty.

The record is bare of any evidence that New Mexico's gross receipts tax would in any way infringe on the Navajo Tribe's right to make their own laws and be governed by them under the circumstances of this case. Although the construction project occurred on the Navajo Reservation, there is no evidence that Navajo money financed the project. The Navajo Tribe was not a party to the contract. (Affidavit of Ted Skowronek, pgf. 11, Tr. Rec. 56, Tr. Proc. 36) In fact, Petitioner agrees that the project was entered into solely with the United States of America. (Plaintiff's proposed finding of fact, No. 21, Tr. Rec., p. 67)

Even if the Navajos were a party to the contract, however, there would still be no infringement on Navajo sovereignty. This is because the legal incidence of New Mexico's gross receipts tax is on the person who sells goods or performs services. Sections 7-9-4, 7-9-3(E) and 7-9-3(K) NMSA 1978, *United States v. State of New Mexico,* 581 F.2d 803 (10th Cir. 1978); *Mescalero Apache Tribe v. O'Cheskey,* 439 F.Supp. 1063 (D.N.M. 1977), *appeal pending* (10th Cir. No. 77-2102). These holdings are in accord with the developed case law on the subject. *United States v. County of Fresno,* 429 U.S. 452 (1977); *Diamond National v. State Equalization Board,* 425 U.S. 268 (1976); *Gurley v. Rhoden,* 421 U.S. 200 (1975);

Agricultural Bank v. Tax Commission, 392 U.S. 339 (1968).

There is no showing that the economic burden of the gross receipts taxes imposed upon Petitioner is borne by the Navajo Tribe in this case. Even if such a showing were made, Petitioner could not prevail in this argument. Where the legal incidence, as opposed to the economic burden, of a state's tax is on a non-Indian on a reservation, the tax has been upheld. *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976); *Fort Mojave Tribe v. County of San Bernardino,* 543 F.2d 1253 (9th Cir. 1976); *Agua Caliente Band of Mission Indians v. County of Riverside,* 442 F.2d 1184 (9th Cir. 1971).

Finally, this Court should decline to decide the Indian sovereignty issue in this case because this is an inappropriate case in which to render such a decision. In the first place, Petitioner is a non-Indian entity. It has no standing to raise the rights of the Indians to make their own laws and be governed by them. *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150 (1970); *Hanson v. Denckla,* 357 U.S. 235 (1958); *Barrows v. Jackson,* 346 U.S. 249 (1953); *Tileston v. Ullman,* 318 U.S. 44 (1943). The Navajo Indians are not a party to this litigation. If Indian sovereignty is an issue in this case, then surely, the Indians have the greatest interest in protecting it. Additionally, the record in this case is inadequate for the reason that this issue was not argued below. There is no evidence in the record to show how Indian sovereignty is or is not affected by New Mexico's tax in the circumstances of this case.

II. THE NEW MEXICO COURT OF APPEALS CORRECTLY DENIED PETITIONER'S CLAIM THAT THE IMPOSITION OF NEW MEXICO'S GROSS RECEIPTS TAX UPON IT UNDER THE CIRCUMSTANCES OF THIS CASE CONSTITUTES A DENIAL OF DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. This Court should decline to review the factual determinations of the New Mexico courts regarding Petitioner's due process claims.

Petitioner's due process claims assume facts not found by the New Mexico courts below. Question (i) assumes that Tiffany's employees never entered any portions of New Mexico not located on the Navajo Reservation. Question (ii) assumes that Tiffany received no benefits from the State of New Mexico. The general policy of this Court has been that it will not reexamine the state court's findings of fact. *Fry Roofing Co. v. Wood,* 344 U.S. 156, 160 (1952); *Grayson v. Harris,* 267 U.S. 352, 358 (1925); *Portland R., L. & P. Co. v. Railroad Commissioner,* 229 U.S. 397, 412 (1913). The New Mexico court's findings are supported by substantial evidence and therefore this Court should decline to review them.

B. Even should this Court review Petitioner's due process claims, the imposition of New Mexico's gross receipts tax does not deny the Petitioner due process under the facts of this case.

Tiffany's due process argument can be broken down into two parts. It argues that there is insufficient nexus with New Mexico and that it received insufficient benefits from New Mexico to be subject to taxation by New Mexico.

The requirements of due process are met in this case. Due process requires only that there exist sufficient nexus between the taxing state and the entity taxed to allow the tax, and that the tax be fairly related to the benefits and opportunities provided by the taxing state. *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977).

Petitioner claims insufficient nexus by virtue of the fact that it is a foreign corporation, not licensed to do business in

New Mexico, doing work on a part of the Navajo Reservation in New Mexico, and it never entered any part of New Mexico off of the Navajo Reservation. (Petition, p. 7) Even if its claim that its employees confined themselves to the Navajo Reservation were properly based on the findings of the court below, it is irrelevant. The Court of Appeals found that substantial benefits were derived by Petitioner and its employees in that they traveled on roads maintained by the State of New Mexico, benefitted from state air pollution controls on the nearby Four Corners generating station, and enjoyed the privilege of engaging in business in New Mexico. (Petition, App. A, pp. 15, 16)

Apparently Petitioner is urging on this court a standard that would require examination in each case of the comings and goings of a construction company's employees in order to determine whether they entered a job site through a neighboring state or through the state in question. Such a standard is not based on the developed law of due process in the taxing field and if it were to be adopted by this court would cause expensive and protracted litigation in order to factually determine in each case the movements of construction employees. Finally, this argument completely ignores that the construction project which gave rise to the tax occurred wholly within the territorial boundaries of the State of New Mexico.

Petitioner's argument also ignores the fact that during the course of the construction project lasting approximately one year, it had approximately 100 employees (Tr. Proc. 54) and at least 20 large pieces of construction equipment (Tr. Proc. 55) located on the job site in New Mexico, generating revenue for Petitioner. This court stated in *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 557 (1977):

> "Standard Pressed Steel [*Standard Pressed Steel Co. v. Department of Revenue of Washington,* 419 U.S. 560 (1975)], held that maintenance in the taxing state of a

> single employee . . . established a sufficient relation to activities within the state producing the gross receipts as to support imposition of the tax."

If the presence of a single employee in the taxing state constitutes sufficient nexus, surely the presence of 100 employees and a substantial amount of valuable property used in New Mexico to generate revenue for its employer or owner constitutes a sufficient nexus for New Mexico to impose its gross receipts tax.

Petitioner also argues that it receives insufficient benefits from New Mexico to justify imposition of the gross receipts tax. The due process test in this regard was succinctly stated by this court in *State of Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940),

> "The simple but controlling question is whether the state has given anything for which it can ask return." 311 U.S. 444.

The record reflects numerous benefits which were provided or were available to Petitioner from the State of New Mexico. There was testimony that Tiffany used a portion of New Mexico Highway 504 to transport both its equipment and employees. (Tr. Proc. 56) Highway 504 is maintained by the State of New Mexico at a cost of $250 to $300 a mile per year. (Tr. Proc. 145) There was also evidence that Tiffany used U.S. Highway 666. (Tr. Proc. 46) New Mexico also maintains that highway. (Tr. Proc. 147) Additionally, the state produced evidence that it provided benefits to Tiffany and its employees through its adoption and enforcement of air quality emissions standards at the nearby Four Corners Power Plant. (Testimony of Cubia Clayton, Tr. Proc., pp. 98-124) There was also testimony that the State of New Mexico licenses and inspects the hospitals on the Navajo Reservation. (Tr. Proc. 78) There was testimony that the State of New Mexico licenses and inspects the hospitals on

the Navajo Reservation. (Tr. Proc. 78) There was testimony that some of the Navajo police receive law enforcement training at the New Mexico State Police Academy (Tr. Proc. 78, 79), and that under some circumstances New Mexico's criminal laws apply to crimes committed upon the Navajo Reservation. (Tr. Proc. 79) There was testimony that the state provides public schools for both Indians and non-Indians on the Navajo Reservation. (Tr. Proc. 69)

There was evidence of activity on Petitioner's part to avoid using other benefits which were available to it. In fact, Tiffany was so concerned that its employees might be benefitted by the State of New Mexico that it carefully instructed them how to enter the New Mexico side of the reservation so as to only enter New Mexico within the boundaries of the Navajo Reservation. (Tr. Proc. 46) Tiffany provided unemployment and workman's compensation coverage through the State of Arizona. (Tr. Proc. 57, 64) Tiffany was bonded in Arizona. (Tr. Proc. 37, 39) It used no New Mexico subcontractors on the project. (Tr. Proc. 49) However, the fact that Petitioner chose not to avail itself of these benefits, which were available to it in New Mexico, in no way detracts from the availability of these benefits. In short, there was ample evidence in the record to support the conclusion of the courts in New Mexico that the State of New Mexico did provide benefits and the protection of its laws to Tiffany.

It is also no defense that the benefits Tiffany did receive cannot be tied, dollar for dollar, to the taxes levied. Due process does not require this. *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937); *Missouri Pacific Railroad v. Road District*, 266 U.S. 187 (1924).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Supreme Court Rules, I certify that the foregoing Brief for Respondent in Opposition was served on opposing counsel by mailing three copies by United States mail, postage prepaid, to Thomas L. Grisham, Attorney for Tiffany Construction Company, Inc., 200 Lomas, N.W.– Suite 400, Albuquerque, New Mexico 87102.

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